

into compliance with the statutory requirements in relation to health and safety of workers who might be called upon to use that scaffolding.

[4] In addition to the prohibition notices, which simply related to different dwellings being constructed at the time, there were improvement notices issued to the sub-contractor, Aerial Scaffolding, specifying areas of the scaffolding that required to be improved.

[5] For practical purposes, I need go no further into the detail of what occurred, because the issue in this appeal is one of principle which affects the construction industry generally. Put shortly, the current legislation is still relatively new, as has been observed in other cases. It was designed to change the previous regime in relation to the interlocking liabilities of various contractors on jobs where more than one contractor was carrying out work.

[6] The issue at the heart of this appeal is the question of who should get the prohibition notice, if a WorkSafe inspector determines that some aspect of a building job is causing, or is likely to cause, a risk to the health and safety of a worker who might reasonably be expected to be on the site.

[7] The scheme of the act and its practical application is the most significant feature in ascertaining the operation of the prohibition notice scheme. Relevant sections obviously include ss 33(3) and 36(1) of the Act in terms of defining obligations. I set out the various provisions.

33 More than 1 person may have same duty

- (1) More than 1 person may have the same duty imposed by or under this Act at the same time.
- (2) Each duty holder must comply with that duty to the standard required by or under this Act even if another duty holder has the same duty.
- (3) If more than 1 person has a duty for the same matter, each person—
 - (a) retains responsibility for that person's duty in relation to the matter; and
 - (b) must discharge that person's duty to the extent to which the person has the ability to influence and control the matter or would have had that ability but for an agreement or arrangement purporting to limit or remove that ability.

[8] Section 36 provides;-

36 Primary duty of care

- (1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—
 - (a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and
 - (b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.
- (2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
- (3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—
 - (a) the provision and maintenance of a work environment that is without risks to health and safety; and
 - (b) the provision and maintenance of safe plant and structures; and
 - (c) the provision and maintenance of safe systems of work; and
 - (d) the safe use, handling, and storage of plant, substances, and structures; and
 - (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
 - (f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
 - (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.
- (4) ...

[9] As against the provisions outlining the interlocking web of obligations referred to above, the prohibition notice regime is set out in s 105.

105 Power to issue prohibition notice

- (1) This section applies if,—
 - (a) an inspector reasonably believes that—
 - (i) an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a

- person arising from an immediate or imminent exposure to a hazard; or
- (ii) an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person arising from an immediate or imminent exposure to a hazard; or
- (b) in respect of any workplace, plant, or substance, or work that is required to be authorised under subpart 2 of Part 5 or a mining operation (as defined in clause 2 of Schedule 3), an inspector—
 - (i) believes that there is a serious risk to the health and safety of any person because of a failure to comply with this Act or regulations; or
 - (ii) believes on reasonable grounds that it is likely that a person will fail to comply with this Act or regulations, and that failure would be likely to cause a serious risk to the health and safety of any person.
- (2) The inspector may give a person who has control over the matter or activity a direction prohibiting the carrying on of the matter or activity, or the carrying on of the matter or activity in a specified way, until an inspector is satisfied that the matter or activity that gives or will give rise to the risk has been remedied.
- (3) The direction may be given orally, but must be confirmed by written notice (a prohibition notice) issued to the person as soon as practicable.

[10] The detailed evidence provided to me by affidavit clearly establishes the various roles played by the head contractor, Rouse Construction, and secondly Aerial Scaffolding's role as a sub-contractor.

[11] In terms of the health and safety inspector's task in considering the issue of a prohibition notice, the first question must always be who has power to control or influence the operations of sub-contractors on-site. It could be contended that a prohibition notice could be issued directly to a sub-contractor, as opposed to the head contractor, in circumstances where the sub-contractor controls a portion and sometimes indeed all of a site, but that is not the situation that we are dealing with here.

[12] On perusing the legislation and remarking upon the absence of prior authority dealing explicitly with this point, argument before me has revolved around who should most appropriately be perceived as the proper recipient of a prohibition notice. The argument in favour of issuing the prohibition notice to a sub-contractor would not hold

water in cases where other sub-contractors, or employees of other sub-contractors, needed to access the scaffolding to do their contracted work.

[13] The reason for that is that a sub-contractor rarely, if ever, has control over all other sub-contractors on a building site. The evidence before me is detailed and extensive about this, the interlocking web of contractual responsibilities, and I accept that it has been established on the balance of probabilities, that the only contractor on this site that had control over everybody on the site, was the head contractor, Rouse Construction.

[14] The argument in favour of the prohibition notice being issued to Rouse Construction is simply that only Rouse Construction can control everybody on the site, and given that there were a number of sub-contractors, for example electrical contractors, painting contractors, roofing contractors and the like, only Rouse Construction were able to require, as a matter of contractual obligation, that the sub-contractors comply with the head contractor's requirements.

[15] Whilst I appreciate that in practice scaffolding has to be tagged on a daily basis as to whether or not it is open for use, and whilst I accept that as a matter of practice the assessment on a daily basis is undertaken by the scaffolding contractor, nevertheless if a scaffolding contractor decides that some more work needs to be done on the scaffolding to make it safe for a particular task, or in relation to a particular issue, the scaffolding contractor does not have a contractual relationship directly with other sub-contractors on the site.

[16] It seems to me, therefore, that as a matter of contractual obligation, in the normal course of building and construction work, prohibition notices can only be issued to those who have control of the people who are working on the site. In the individual circumstances of this case, with a large site and a large number of sub-contractors, and indeed a number of employees of various sub-contractors, the prohibition notice must, for practical reasons, be issued only to the head contractor, which in this case is Rouse Construction.

[17] In so saying, I am not suggesting that Rouse Construction is in any way at fault. From their point of view, Aerial Scaffolding was selected in a competitive tender process, in which the highest tender was taken, rather than the lowest. And from Rouse Construction's point of view, the scaffolding contractor is hired to produce WorkSafe compliant scaffolding, because there is simply no point in having non-compliant scaffolding on any building site, it is unlikely that non-compliant scaffolding will be any use to the head contractor. Accordingly, the head contractor is relying completely on the contracted scaffolder to produce safe, and practically useful scaffolding for the head contractor's employees and sub-contractors and their employees to use.

[18] The point is well-illustrated in this case, by reference to the improvement notices which were issued to Aerial Scaffolding. In my view, there would be little point in issuing improvement notices to the head contractor, and the inspectors did not do that. The inspectors issued the improvement notices to the contractor that had a contract to undertake the scaffolding work, as Aerial Scaffolding was the contractor that had immediate responsibility for the portion of the scaffolding that had safety issues. If the improvement notice had been issued to the head contractor, Rouse Construction, all that could have happened would have been that the improvement notice would have been immediately handed to the scaffolding contractor. who would then have had to comply with it anyway.

[19] In terms of practice on building sites, it seems to me that by far the most sensible interpretation of the statute's responsibility provisions on the one hand, and the prohibition and improvement notice regime on the other hand, would be that a head contractor can and should be issued with a prohibition notice in relation to defective scaffolding or work of some kind which poses a danger to the health and safety of workers on the site.

[20] As a matter of law, I am satisfied that the use of a prohibition notice says nothing at all about the standards or work practices of the head contractor. In this particular case, I have not been asked to, and I see no reason to make any determination as to whether any fault has been established on the part of the head contractor. What

I can say, is that the issue of a prohibition notice does not by itself justify any conclusion about the acts or omissions of the head contractor.

[21] The issue of the improvement notice, on the other hand, certainly speaks directly to the issue of who has the responsibility to carry out any necessary remedial action. As a matter of common sense, in this case, only the scaffolders can carry that work out. Only the scaffolders are competent, and only the scaffolders have appropriate qualifications to make the necessary health and safety decisions about the work that the notice required to be addressed.

[22] In cases such as this, therefore, I am satisfied that the statutory regime allows for, and will usually require, that a prohibition notice be issued to the head contractor who controls the site, and thus where contractors and workers go, whilst improvement notices can and should be issued to sub-contractors, if sub-contractors have responsibility for any portion of the site that they are engaged to work upon. In relation to scaffolding in particular, it seems to me that it would be appropriate in most cases, and it certainly was appropriate in this case, for the inspectorate to issue the improvement notice to the scaffolding company, for them to remedy the identified defects.

[23] The issue in this case is fundamental to a consideration of the statutory matrix of responsibility for health and safety, as it applies to larger building sites in New Zealand. I have been invited to deal with the matters covered in this judgment on the basis that although the appeal is in one sense moot, because construction on the site has been completed, nevertheless the issues required clarity, and it would be of benefit to the construction industry generally, and to WorkSafe's inspectorate, if the interplay of responsibilities between the various contractors could be made the subject of examination in what is in substance a declaratory judgment.

[24] Here, I am satisfied that the circumstances would not, in this case, justify me drawing any conclusions about fault on the part of Rouse Construction, and I have not been asked to make any determination in relation to that. The decision appealed from, in my view is legally correct, although I have explored matters in considerably more legal detail, for the reasons set out.

[25] The appeal will accordingly be dismissed, but because of the essentially declaratory nature of this judgment, I direct that costs lie where they fall.

Judge TR Ingram
District Court Judge

Date of authentication: 03/08/2020
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